



# 論説 THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA

著者	Covell Charles, Covell Shahzadi
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## THE CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA

Charles COVELL\* and Shahzadi COVELL\*\*

The period of reform in the People's Republic of China that commenced in December 1978 has witnessed the determination of the governing authorities there to establish the rule of law, as in a form consistent with what is affirmed as the ideal condition of socialism with Chinese characteristics. The socialist legal order that has thereby been brought into being encompasses the criminal law, constitutional law and administrative law, as the principal branches of public law, in addition to the system of civil law that relates to the principles of private law. The general focus in this paper lies with the civil law, and with the subject head belonging to the civil law that is picked out for particular attention being the law of contract. Thus in the first part of the paper, there is provided a detailed exposition of the provisions of the Contract Law of the People's Republic of China as enacted and implemented in 1999. In the second part of the paper, the Contract Law is reviewed and considered in contextual terms, as in its relation to the broader issues to do with the socialist legal order and the socialist market economic order.<sup>1</sup>

The era of political and economic reform in the People's Republic of China, or the PRC, began with the historic 3rd Plenum of the 11th Central Committee of the Communist Party of China, or the CPC, which was held in Beijing from 18 to 22 December 1978. A key

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\* Associate Professor, Graduate School of Humanities and Social Sciences, University of Tsukuba.

\*\* One-time Assistant Professor, Graduate School of Humanities and Social Sciences, University of Tsukuba.

1 The discussion of the civil law of the PRC in this paper is based in part in the method of the critical exposition of legal source materials. The full Chinese language texts of the legal source materials to which reference is made are to be found in the relevant editions of *Zhonghua Renmin Gongheguo Fagui Huibian* (or *The Compilation of the Statutes of the People's Republic of China*), *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* (or *The Gazette of the State Council of the People's Republic of China*), or *Renmin Ribao* (*The People's Daily*). The formal titles of the legal source materials are given first in English and then in Chinese phonetics, and with both the English translations and the Chinese phonetics versions being the authors' own.

feature of the reform era in the PRC has been the endeavour of the leadership elites within the CPC and the state government to establish an effective rule of law, as the containing framework for social, political and economic activity and organization. The form of the rule of law at issue, here, is that which is referred to in the PRC as the socialist legal system, or the socialist legal order. The development of the socialist legal order has since 1978 been pointed to by the Party-State leadership as essential for the realization of its declared public policy agenda of socialist modernization. This is such that the socialist legal order has come to stand with the system of socialist democracy, and with the so-called socialist market economic order, as together comprising the core component parts of the reform project that the leadership has set for itself and that it has famously defined as in terms of the way of socialism with Chinese characteristics.

The socialist system of law, as it now exists in the PRC, has involved the elaboration of complex legal forms and legal categories, and the extension of these to state, society and economy in all their various aspects. The foundation of the socialist legal order of the PRC lies in the law as set out in the State Constitution, and with the three principal branches of the socialist legal order being the criminal law, the civil law, and the body of administrative law as based in the procedure for the judicial review of administrative action. The law of the State Constitution and the branches of the criminal law and the administrative law pertain to the sphere of public law: that is, the law that concerns the state and the state agencies in their relation to private parties, and as where the latter are either natural persons or parties having the artificial status of legal person entities. In contrast to this, the civil law pertains to the subject-matters belonging to the sphere of private law: that is, the law that applies to the rights, interests and obligations of private parties, and the relations among them, and to the rights, interests and obligations, and the relationships, of public actors, such as public officials and the institutions of state government at its different levels, but as where these remain private as to their form, standing and character.

The concern of the present paper is with one particular part of the civil law of the PRC. As it has come to be established in the PRC, the civil law comprehends the conventional subject heads that are generally accepted as falling within the province of private law. These include, in specific terms, property, intellectual property as with copyright and patents, contract, tort, and family law as so with marriage, adoption and succession. The civil law

also comprehends the various subject heads that come under commercial law, as is the case with enterprises and corporations, bankruptcy, insurance, futures and securities, and the maritime code. It is to be noted that in the PRC the civil law is set apart from what is designated as economic law. The latter is to do with matters of public law where the state, and the state authorities, discharge administrative or regulatory functions as in relation to society and the economic order: and with this being so, for example, with fiscal and financial affairs, natural resources, communications and transport, land, prices, and trade and commerce. Even so, the scope of the civil law in the PRC remains immense as to the sphere of its application, and, in view of this, it is intended to restrict the treatment of it here to the subject of the law of contract as being among the core substantive elements of this body of law. Thus the first part of the paper is devoted to a critical exposition of the principles of the contract law as this now obtains in the PRC. In the second part of the paper, the merits and limitations of the contract law of the PRC are assessed, and with the law of contract being considered principally in reference to the context set by the larger social, political and economic environment that has been brought into being in the PRC during the reform period.

The social, political and economic environment that has come about in the PRC with the implementing of the reform agenda, and that is being taken to set the context for discussion of the law of contract, has many aspects to it. Of these, the two that are attended to in this paper are, first and foremost, the socialist legal order as such, and, secondarily and in relation to it, the socialist market economic order. The underlying principles of the socialist legal order and of the socialist market economic order are expounded in detail, and as in line with the official statements of the CPC as where there are to be found set out the terms and direction of the public policy that has been, and is being, pursued by the Party-State leadership in the PRC.

As to the socialist legal order, it is explained in the paper that the Party-State leadership has moved to establish a system of rulership based in the formal institutional principles identifying the essential desiderata as pertaining to the idea of the rule of law and constitutional government. These include: the promulgation of laws to be followed by citizens and as laying down their rights and duties, and with the laws being enforced through the application of adequate sanctions; the presence of courts that are independent, and that

act to adjudicate cases in recognition of the equality of citizens under the laws and of the common subjection of all parties, public or private, to the laws; the powers of government and public administration as being official powers, and as exercised within offices constituted through the laws and where the office holders are themselves bound by these; the formal separation of the constitutional powers as vested in, and relating to, the office of government. It is explained further that the socialist legal order has been adopted by the Party-State leadership as an instrument for the combatting of official corruption and for the effecting of administrative reforms. In addition to this, the socialist legal order has been developed such that it has come to acquire a normative dimension and character. So, for example, the cause of the socialist legal order is now very much bound up with the declared commitment of the Party-State leadership to the principles of human rights. At the same time, the socialist legal order is now presented as giving effect to the normatively defined ends of justice and social equity, such as are understood to be conducive to the realizing of the preferred condition of a socialism promoting harmony within society, and with the relevant principles of justice and social equity being associated by the Party-State leadership with, among other things, the provision of welfare-directed public services.

The development of the socialist legal order in the PRC has been closely interconnected with the development of the socialist market economic order. As it is discussed in the paper, the socialist market economic order is understood to have come about through the reorganization of the state-owned industrial enterprises that had been the bulwark of the political command economic order as brought into being and maintained in the PRC during the pre-reform era. This process of reorganization has involved the subjecting of the state-owned industrial enterprises to the market disciplines, in addition to the releasing of substantial parts of the means of industrial production from subordination to the ownership rights and powers, and the management rights and powers, such as were formerly vested in the state authorities on a sole and exclusive basis. The key institutional modalities for this have been the introduction of a corporation system as based in principles of ownership through share-holding, and the emergence and progressive enlargement of a private enterprise sector as co-existing with certain strategic state industrial sectors which have remained in subjection to public ownership. The socialist market economic order has everywhere been dependent on the socialist legal order, as where the latter has provided it

with the legal forms and legal categories that have facilitated its full realization. Thus it is that the criminal law has played its part in the deterring and punishment of economic corruption and wrong-doing, and thereby ensuring the openness and effectiveness of the market processes. The administrative law and the economic law have served to establish a regulatory framework as allowing for full supervision by the state authorities of both the private and the publicly owned industrial enterprises. As for the civil law, this has been foundational for the socialist market economic order. For the civil law has set out the legal frameworks relating to such subject-matters as corporations and share-holding, which have provided for the reform of the state-owned industrial enterprises and the coming into being of the private enterprise sector, while it has at the same time set out the legal frameworks applying to the principles of contract, property and tort that are essential to the functioning of a market-determined economic order.

The commitment of the Party-State leadership to the bringing into being of the rule of law and the institutions of constitutional government, as in terms of the socialist legal order, has been well recognized in the general commentaries on the PRC and the reform era.<sup>2</sup> In addition, there has come to be established a substantial body of secondary literature on the different aspects of law and adjudication in the PRC, and with major contributions having been made by both native Chinese and foreign writers. The first two full decades of the reform period saw the publication of notable, and in some ways seminal, works on the different branches of the legal system in the PRC in the early stages of their evolution: as so, for example, the study by Jianfu Chen of the civil law,<sup>3</sup> and the study by Lin Feng of the administrative law procedures.<sup>4</sup> With the consolidation of the socialist legal order as the PRC entered the 2000s, there were to appear works providing a comprehensive overview of the development of the system of law and adjudication in the PRC as a whole, such as the

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2 Among the relevant academic commentaries, see for example: Tony Saich, *Governance and Politics of China* (2001), 3rd fully revised and updated edition (New York: Palgrave Macmillan, 2011), Chapter 6, pp. 161–70.

3 Jianfu Chen, *From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the People's Republic of China* (Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1995).

4 Lin Feng, *Administrative Law Procedures and Remedies in China* (Hong Kong and London: Sweet and Maxwell, 1996).

general commentary on the subject by Randall Peerenboom,<sup>5</sup> as well as treatises that provided the detailed critical exposition of the essential elements of the legal system, such as the contribution to this genre from Daniel C.K. Chow.<sup>6</sup> There have also been works addressing first-order issues to do with the rule of law and constitutional government in the PRC as such, and as bringing into focus the merits and limitations of the actual progress made there towards these ends and the prospects for the future. The works that belong to this category include the following: an influential collection of writings by Li Buyun on constitutionalism in the PRC;<sup>7</sup> a wide-ranging collection of articles edited by Suisheng Zhao on the rule of law and democratization in the PRC,<sup>8</sup> and featuring a statement by Pan Wei of his much discussed proposal for a consultative rule of law regime;<sup>9</sup> a collection of articles on constitutionalism under the editorship of Stéphanie Balme and Michael W. Dowdle,<sup>10</sup> and a further collection of articles on the independence of the judiciary as edited by Randall Peerenboom,<sup>11</sup> and a systematic analysis of the principles of constitutional law in the PRC by Qianfan Zhang.<sup>12</sup>

The present paper examines the contract law of the PRC primarily in reference to the context set through the socialist legal order and the socialist market economic order. This point of reference is crucial, and it is adopted here such that the contract law is considered in relation to the substance of the official public doctrine in the PRC: an approach that runs counter to the tendency of much of the critical writing on law and adjudication in the PRC,

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5 Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002). Further to Peerenboom on the rule of law in the PRC, see: 'Competing Conceptions of Rule of Law in China', in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, ed. Randall Peerenboom (London and New York: RoutledgeCurzon, 2004), pp. 113–45.

6 Daniel C.K. Chow, *The Legal System of the People's Republic of China* (St Paul, Minnesota: West Group, 2003).

7 Li Buyun, *Constitutionalism and China* (Beijing, China: Law Press, 2006).

8 *Debating Political Reform in China: Rule of Law vs. Democratization*, ed. Suisheng Zhao (Armonk, New York and London: M.E. Sharpe, 2006).

9 Pan Wei, 'Toward a Consultative Rule of Law Regime in China', in Suisheng Zhao (ed.), *Debating Political Reform in China*, pp. 3–40.

10 *Building Constitutionalism in China*, ed. Stéphanie Balme and Michael W. Dowdle (New York: Palgrave Macmillan, 2009).

11 *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (Cambridge: Cambridge University Press, 2010).

12 Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2012).

as where the normative and ideological dimensions of public policy are left out of account.<sup>13</sup> At the same time, it is to be emphasized that the concern of the paper with the civil law, and with the law of contract as an integral part of this, is intended to direct attention to the system of law and adjudication in the PRC: and with this being so such as to counter the tendency of some commentators to disregard the complex internal dynamics of the social, legal, political and economic organization of the PRC, and in preference for characterizing this in terms of its comprising a state order that possesses the attributes of a monolithic authoritarianism.<sup>14</sup>

In regard to the specifics of the substantive claims put forward in this paper, it is argued that the civil law in general, and the law of contract in particular, are to be recognized as playing, and as having played, a positive role in developing the rule of law and the institutions of constitutional government in the PRC. Thus it is explained that the civil law has served to affirm certain essential rights of the individual, as to do with the person, property and contract, and that the law on contract has identified the conditions where certain of such rights are to be determined as having been brought into being or as having been violated. It is further explained that the civil law has been supported by a civil adjudicative procedure where disputes about rights may be settled, and where judgments about rights and rights violations may be effectively enforced. With this, the emphasis is on

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13 A notable exception, here, is Peerenboom, who gives recognition to the normative and ideological issues as bound up with the system of law and adjudication in the PRC through his endeavour to survey its basic elements by referring these to four competing ideal conceptions, or types, of the rule of law, which he specifies as follows: the liberal democratic, the communitarian, the neo-authoritarian, and the statist socialist conceptions of the rule of law. This approach is instructive, although it differs from the one adopted in the present paper where the official public doctrine enunciated by the Party-State leadership, rather than abstract typologies, is taken as the point of reference for introducing normative-ideological principles in discussion of the PRC and its legal system. For Peerenboom and his specification of the ideal types of the rule of law, see: *China's Long March toward Rule of Law*, Chapter 3; 'Competing Conceptions of Rule of Law in China', especially pp. 118-37.

14 Thus Saich ignores the civil law of the PRC, and so is unable to consider how its presence might result in a relatively complex institutional diversification as within the authority structures running through state and society as a whole. Instead, he writes, somewhat uncompromisingly, of the legal system of the PRC as being a bureaucratic instrument to realize the ends set by the state, and as subject to arbitrary interference by Party-State officials, while he, at the same time, emphasizes the respects in which the PRC has fallen short of giving proper effect to the constitutional rights of citizens and to the international standards on human rights. *Governance and Politics of China*, Chapter 6, especially pp. 162-3, 168-70.



the contribution made from within the sphere of private law to the cause of the rule of law and constitutional government in the PRC: and with this being instructive in the respect that, for most commentators on the matter, the issues to do with the rule of law and constitutional government are generally considered from the public law standpoint. So, for example, it is customary for commentators on the PRC to see the realization of the rule of law and constitutional government within the state-political order as depending on the perfecting of the system of administrative law and the procedure for the judicial review of administrative action,<sup>15</sup> rather than as something that is, or that has been, bound up with the presence and proper functioning of the form of judicial procedure that is particular to the civil law.<sup>16</sup> Then again, it is no less customary for the commentators to associate rule of law and constitutionalist issues in the PRC with the principles of individual human rights,<sup>17</sup> but to the neglect of the rights secured to individuals through the civil law: and with civil rights themselves being thought of essentially as bearing the character of economic rights.<sup>18</sup> In

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15 For the central importance of administrative law and the judicial review procedure as for the rule of law and constitutionalism in the PRC, see: Peerenboom, *China's Long March toward Rule of Law*, Chapter 9; Li Buyun, *Constitutionalism and China*, Chapter 12. The judicial review procedure is given prominence in the articles collected together by Balme and Dowdle in their volume on constitutionalism in the PRC, regarding which see particularly: Balme and Dowdle, 'Introduction: Exploring for Constitutionalism in 21st Century China', in *Building Constitutionalism in China*, pp. 1–20. For a detailed appraisal of the merits and limitations of judicial review in the PRC, see: Qianfan Zhang, *The Constitution of China*, Chapters 5–6.

16 On the origins of the differentiation as between the administrative law procedure and the civil law and other adjudicative procedures, see: Lin Feng, *Administrative Law Procedures and Remedies in China*, Chapter 7, p. 116. It is to be noted, as in connection with the question of the civil law procedure and the rule of law and constitutional government in the PRC, that Fu Yulin and Randall Peerenboom, in discussion of judicial independence as a condition for the rule of law in the PRC, have found that the People's Courts act independently in the majority of the cases falling within the province of the civil law: as in the sense of the courts being free from systemic interference as to their proceedings. For their arguments on this matter, see: 'A New Analytic Framework for Understanding and Promoting Judicial Independence in China', in Peerenboom (ed.), *Judicial Independence in China*, pp. 95–133 – especially pp. 125–7.

17 On the issue of human rights and constitutional rights in the PRC, and the connections between this and the question of the rule of law and constitutional government, see variously: Peerenboom, *China's Long March toward Rule of Law*, Chapter 11, especially pp. 533–42; Chow, *The Legal System of the People's Republic of China*, Chapter 3, Section D, pp. 105–13; Li Buyun, *Constitutionalism and China*, Chapter 1, pp. 20–35, and Chapters 20–28; Qianfan Zhang, *The Constitution of China*, Chapter 7–8.

18 In general, the rights secured to citizens through the civil law in the PRC are thought of, and presented, as economic rights, and without reference to broader questions to do with the rule of law and constitutional government. This is so particularly with Jianfu Chen, who, in *From Administrative*

regard to the last consideration, the paper sets out a further claim as to do with the law of contract as in reference to the socialist market economic order. Here, it is argued that the civil law, and as encompassing the law on contract, has been crucial for the development of the socialist market economic order through establishing a serviceable legal framework for its organization and maintenance. However, it is also argued that the contract law has the potential to supplement the branches of public law, as so with the administrative law and economic law, in fulfilling a regulatory function in respect of the socialist market economic order in its actual operations; and, further, that the contract law may serve to promote public goods, rather than work only to uphold private rights and interests, in the fields of public service provision and environmental protection such as are now seen as critical for bringing about the prescribed end state of harmonious socialism as within the PRC.<sup>19</sup>

### i. The Principles of Contract Law in the PRC

The civil law of the PRC has been developed on a continuous basis as from the first years of the reform period and through to the present. In general, the development of the civil law has involved the progressive enactment of statutes on the various subject heads of the law by the National People's Congress, as the supreme legislative power in the PRC, or by its Standing Committee. This is true of the law of contract. Thus the foundations of contract law in the PRC were laid in the 1980s with the enacting of three key statutes: the Economic Contract Law of the PRC, as adopted at the 4th Session of the 5th National

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*Authorisation to Private Law*, focuses on property rights and the role of the civil law in relation to the socialist market economic order. Again, Chow adopts a similar approach with his summation of the essentials of the civil law, and as where he discusses the subject in conjunction with economic law. *The Legal System of the People's Republic of China*, Chapter 9, Section B.

- 19 Pan Wei advocates what he calls a consultative rule of law regime for the PRC. Under this regime, the political order of the PRC will not move towards full democratization, but will, instead, be based in a rule of law as supplemented by a neutral civil service, an autonomous judicial system, extensive social consultation institutions, an independent anti-corruption administration, an independent auditing system, and guaranteed freedoms relating to speech, the press, assembly and association. It may be observed here, in passing, that there is no reason why the consultative rule of law regime, as Pan Wei argues for it, should not be promoted, and facilitated, in the future through the increasing participation by citizens in civil litigation cases. For Pan Wei on the institutional requirements for the consultative rule of law regime, see: 'Toward a Consultative Rule of Law Regime in China', pp. 32–5.

People's Congress on 13 December 1981 and as entered into force on 1 July 1982,<sup>20</sup> the Technology Contracts Law of the PRC, as adopted at the 21st Session of the Standing Committee of the 6th National People's Congress on 23 June 1987 and as entered into force on 1 November 1987,<sup>21</sup> the Chinese-Foreign Economic Joint Venture Contracts Law of the PRC, as adopted at the 1st Session of the 7th National People's Congress on 13 April 1988 and as effective from that date.<sup>22</sup> The prominent position of contract as within the civil law was confirmed with the relevant provisions of the statute that is fundamental for the civil law system in the PRC: the General Principles of the Civil Law of the PRC, as adopted at the 4th Session of the 6th National People's Congress on 12 April 1986 and as entered into force on 1 January 1987.<sup>23</sup> The institutional framework for the civil law was underwritten with the statute that sets out the form of procedure to be followed with civil disputes, and including such disputes as those concerning contractual rights and obligations, as these are brought for adjudication before the People's Courts: the Civil Procedure Law of the PRC, as adopted at the 4th Session of the 7th National People's Congress on 9 April 1991 and as effective from that date.<sup>24</sup> Finally, there is the landmark statute on the law of contract that consolidated and superseded the statutes from the 1980s and that is the focus of attention here: the Contract Law of the PRC, as adopted at the 2nd Session of the 9th National People's Congress on 15 March 1999 and as effective from 1 October 1999.<sup>25</sup>

In the General Principles of the Civil Law of the PRC, there are set out the principles pertaining to such matters to do with civil law, and as bearing on the law of contract, as the subjects of civil law, the nature of civil juridical acts, the rights at issue with the civil law, and the conditions for civil liability. The subjects of the civil law are understood to have the capacity for civil conduct and to bear civil rights and civil obligations, and they are

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20 Economic Contract Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Jingji Hetong Fa*.

21 Technology Contracts Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Jishu Hetong Fa*.

22 Chinese-Foreign Economic Joint Venture Contracts Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa*.

23 General Principles of the Civil Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Min Fa Tongze*.

24 Civil Procedure Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Minshi Susong Fa*.

25 Contract Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Hetong Fa*.

identified as individual citizens in their status as natural persons (Chapter 2, Articles 9–35) and as legal person entities, such as industrial enterprises, independently financed official bodies, social organizations and collaborative economic associations (Chapter 3, Articles 36–53). The acts that are civil juridical acts are defined and explained as the acts of individual citizens and legal person entities, and where these have the effect of establishing, altering or terminating civil rights and civil obligations (Chapter 4, Articles 54–70).

The rights that are civil rights, as in the sense of falling within the province of the civil law, are specified in Chapter 5, and they are there divided into four categories: property rights, the rights of creditors as relative to contracts, intellectual property rights and personal rights. As to property rights, these relate to ownership as in regard to the possession, use and disposal of property, and with the forms of property referred to including state property and property owned by collective organizations, as well as property subject to private ownership and with inheritance rights secured (Articles 71–72, 73–74, 75–78). Concerning creditor rights, these pertain to debts considered as involving relationships based in rights and obligations established between creditors and debtors as in line with the terms of agreements, and with the essential form of the agreements at issue here being that of the legally created contract (Articles 84, 85–87). The sphere of intellectual property rights comprehends the rights of individual citizens and legal person entities in regard to authorship and copyright, patents, trademarks and discoveries (Articles 94–97). As in regard to personal rights, it is provided that individual citizens have the basic rights to do with life and health. In addition, they have the right to a personal name, and with legal person entities having the right to create and use a name. Related to this, individual citizens have a right in and over the use of their own personal image, and both individual citizens and legal person entities have the right of reputation, and with this being such as to exclude the damage to reputation as arising from libel and slander. The sphere of personal rights also includes the rights that are centred on matters to do with marriage and the family, and with these providing that marriage is to be based in consent and that the institution of marriage and family association are to have full protection under law. (Articles 98, 99, 100, 101–102, 103–105).

The principles governing civil liability, and the discharging of it through the provision of compensation for injured parties and other remedies, are set out in Chapter 6. It is here

laid down, as to the fundamentals, that civil liability arises from breach of contract, and from the violation of rights relating to property, intellectual property and the person (Articles 106-107). The basic rules on breach of contract and the compensation due for this are stated in some detail (Articles 111-116). There is also a detailed statement of the rights, in regard to property, intellectual property and the person, whose violation results in civil liability and the necessity for compensation (Articles 117-120). In addition, the various parties who may bear civil liability are identified in terms going beyond the bare designation of them as individual citizens and legal person entities. Thus it is provided that civil liability may be borne by state administrative authorities and their official personnel (Article 121), as well as by parties causing property damage or personal injury such as manufacturers and retailers, parties responsible for environmental pollution, parties engaged in the construction industries, the owners and managers of buildings and premises, and so on (Articles 121, 122-127). There is also included in Chapter 6 a full specification of the methods available for the discharging of civil liability. These include, for example, the cessation of rights violations, the return or restoration of property, the repair of damaged property, the payment of compensation for losses suffered, the paying of damages for breach of contract, and the judicially sanctioned confiscations of the property of rights violators (Article 134). Finally, it is to be noted that Chapter 7 concerns the limitations on civil actions as brought before the People's Courts (Articles 135-141), Chapter 8 states the principles pertaining to the civil law in relation to foreign parties (Articles 142-150), and with Chapter 9 containing supplementary provisions on certain technical matters and on the date of the law coming into force (Articles 151-156).

The provisions relating to contract as contained in the General Principles of the Civil Law do no more than point to the basic framework for contract law. It is with the Contract Law of 1999 that is to be found the substance of the law of contract obtaining in the PRC in its full detail and completeness. The Contract Law comprises 428 articles, and with these being organized in the form of twenty-three separate chapters and a concluding statement on supplementary provisions. The chapters comprising the Contract Law are divided as between those running from Chapter 1 to Chapter 8, which set out general provisions, and those running from Chapter 9 to Chapter 23, which set out the specialized provisions relating to various subject-designated contracts. The concern here, for the purposes of

exposition, is with the chapters that elaborate the law on contract as to its general provisions. Thus in Chapter 1 (Articles 1–8), there are stated the general principles of contract law. In Chapter 2 (Articles 9–43), there are laid down the principles that apply to the forming of contracts, while Chapter 3 (Articles 44–59) treats of the principles to do with contracts that have application to the conditions for their validation. The principles governing the fulfilment of contracts are set out in Chapter 4 (Articles 60–76), and with the principles relating to the modification and transference of contracts being laid down in Chapter 5 (Articles 77–90). In Chapter 6 (Articles 91–106), there are stated the principles to do with the termination of the rights and obligations as established through contracts, and in Chapter 7 (Articles 107–122) there are set down the principles pertaining to liability for breach of contract. As for Chapter 8 (Articles 123–129), this contains certain miscellaneous provisions.

The general principles set out in Chapter 1 concern the purpose of the contract law, the definition of contracts, and the normative considerations having application to the parties to contracts. Thus it is provided that the contract law has the purpose that it is to protect the lawful rights and interests of the parties to contracts, to maintain the social and economic order, and to advance the ends of socialist modernization (Article 1). As concerning the definition of contracts, it is stated that contracts are agreements to do with the establishing, alteration or termination of the relationships between parties as that are the subjects of civil law, and as involving their civil rights and obligations (Article 2). In regard to the normative dimension of contracts, it is laid down that the parties to contracts have equal status in law, and that they have the right to enter into contractual relations on a voluntary basis and in freedom from any unlawful external interference (Articles 3–4). Further, the parties to contracts are to conform with the principles of equity, as in determining their mutual rights and obligations; and, in addition, the parties are to conform with laws and administrative regulations and to respect social ethical norms, as well as to refrain from subverting the social and economic order and from acting to the detriment of social and public interests (Articles 5–7). Finally, it is provided that contracts that have been lawfully executed possess a legal binding force, and such that the parties to them are to fulfil their obligations as contracted for, and that lawfully executed contracts are to be protected in law (Article 8).

As to the formation of contracts, it is stated that the parties to contracts are to have the

capacity for civil rights, and for the performing of civil juridical acts, and that contracts may be made in writing, verbally, or in other appropriate forms. It is stated further that, as to content, contracts will make reference to the names and addresses of parties, their specific subject-matters and the factors of quantity, quality and price and remuneration as relating to these, the time and mode of completion, the conditions for liability as to breach, and the procedures for resolving disputes about their terms (Articles 9–12). The key element in the forming of contracts is that contracts involve a relationship between the parties to them as based in an offer and the acceptance of it (Article 13). The offer indicates the willingness of the party concerned to enter into contractual relations with some or other party, as in regard to some specific subject-matter, and as where the party making the offer, as through the indication of their desire to form a contract, will be bound by this upon the acceptance of it by the other party (Article 14). An offer becomes effective when it is communicated to the other party, although it may be withdrawn or revoked subject to conditions and it may lose its effectiveness in certain circumstances (Articles 15–20). The forming of a contract requires the acceptance of the offer at issue, and with this to take the form of a notice, or the performing of acts if in line with established trade practices, and with it being subject to the various conditions to do with time limits (Articles 21–24). The contract is executed at the time when the acceptance becomes effective: that is, when the acceptance notice is communicated to the party making the offer, or, if no notice is needed, the relevant act of acceptance is performed as per established trade practices (Articles 25–26). Of the further provisions on the formation of contracts, there are two that deserve special mention: first, the subject-matter of an offer is to be consistent, as to its content, with that of the subject-matter that is the basis for an acceptance (Article 30); and, second, the application of standard clauses in contracts, as to the determining of the rights and obligations of the parties, is to conform with the principle of fairness (Article 39).

In regard to the validity of contracts, the essential principle laid down holds that contracts that are concluded according to law become effective, and hence valid, on their being executed, or with the completion of the due official approval and registration procedures where this is required under the relevant laws and administrative regulations (Article 44). This principle is fundamental, and it stands even when the validity of contracts is made to depend on the fulfilment of collateral conditions (Article 45), or the expiry of

time limits for their coming into effect (Article 46). In general, contracts entered into by agents on behalf of principals are effective, although with this principle being subject to such qualifications as that contracts will not be binding on the principals where the agents have acted without authority or beyond the terms of their authorization (Articles 47–49). It is provided that contracts may be rendered invalid, as so in the following cases: contracts that are entered into by parties through fraud and coercion, and to the detriment of the interests of the state; contracts that involve malicious designs as against the interests of the state, collective organizations, and third parties; contracts that promote unlawful objectives concealed within legitimate forms; contracts that work harm to social and public interests; contracts that involve the violation of the laws and administrative regulations (Article 52). In addition, the clauses of contracts providing for exemption from liability for one party will be invalid where these relate to the causing of physical injury to the other party, or to the loss of their property through design or negligence (Article 53). The parties to contracts have the right to go through the People's Courts to have altered, or rescinded, contracts that are entered into through significant misunderstanding or that are lacking in fairness, and where the parties are induced to enter into contracts through deceit and coercion or are taken advantage of (Article 54). Related to this, it is provided that where contracts are invalidated or rescinded, then all property obtained through the application of the contracts concerned has to be returned, or, if this is impossible, appropriate compensation is to be paid (Article 58).

Concerning the fulfilment of contracts, the key principle is that the parties to contracts are to perform their mutual obligations; in addition, they are to conform with the requirements of good faith and to discharge the duties to do with such matters as notification, mutual assistance and confidentiality as in line with the purposes of their contracts and with established trade practices (Article 60). In circumstances where the terms of contracts are unclear, as, say, with such issues as quality requirements, price and remuneration and mode of performance, then the contracts are to be performed as in line with such norms as state standards or established trade standards (as for quality requirements) and government stipulations (as for price and remuneration), or as in line with the aims and objectives of the contracts concerned (as for mode of performance) (Article 62). There are also rules and principles for contracts where the price for fulfilment is set or



influenced by the government (Article 63), and rules and principles for the ordering and prioritizing of the obligations owed by the debtor parties to contracts as relative to creditors and third parties (Articles 64–75).

As to the modification and transfer of contracts, the principle that is cardinal is that the parties may modify contracts through agreement as based in consultation, and in line with the due official approval and registration procedures, where laws and administrative regulations require this, and with the modifications made to contracts having to proceed from the agreement of the parties (Articles 77–78). In accordance with this, it is provided that creditor parties to contracts may transfer their rights to third parties, unless this is expressly excluded by the nature of the contract, the agreement of the parties and the provisions of the laws, but with it being required that the transfer is to be notified to the debtor parties concerned (Articles 79–83). Likewise, it is provided that the debtor parties to contracts may transfer their obligations to third parties, but with this being subject to securing the consent of the creditor parties (Articles 84–86).

With the matter of the termination of the rights and obligations established by contracts, it is laid down that contractual rights and obligations may be terminated as under the following conditions: the contracted for liabilities of the parties are met, the relevant contracts are dissolved, the liabilities of the parties are offset as one against the other, the debtor parties deposit the designated subject-matters as contracted for, the creditor parties grant exemption from liabilities, the rights and liabilities of creditors are undertaken by a single person, or other conditions obtain as per the law or through the stipulation of the parties (Article 91). In amplification of this, it is provided that contracts may be dissolved by the parties through agreement and subject to stipulated conditions, as where, for example, the aims of contracts are obstructed through force majeure, or one or other of the parties fails to fulfil or delays in fulfilling their obligations, or engages in illegal activities making it impossible to realize the ends of the contracts; and with contract dissolution being qualified by time limits and requirements as to the due notifications owed by the parties as one to another (Articles 93–96). In addition, there are specific provisions on the termination of contracts through the offsetting of liabilities by the parties (Articles 99–100), the circumstances in which the debtor parties are able to deposit the designated subject-matters of contracts (Articles 101–104), the exempting of debtor parties as to their liabilities (Article

105), and the assumption by single individuals of the rights and obligations of creditor parties (Article 106).

The issue of liability for breach of contract is critical as in regard to the legal effectiveness of contractual agreements. Thus it is stated that when one or other of the parties to a contract fails to perform their obligations under it, or fails to perform them as contracted for, then the party in question bears liability for breach of contract, and with the liability to be discharged through the performing of the obligations, the taking of remedial measures, or the paying of compensation for the losses caused to the other party (Article 107). In accordance with this core principle, it is provided, as to specifics, that liability for breach of contract arises when one or other of the parties to a contract indicates an intention not to perform their obligations prior to the expiry of the fulfilment period, or when they fail to pay charges or remuneration, to discharge non-pecuniary debts, or to make good for losses caused through the degraded quality of the subject-matters of the contract (Articles 108–111). Where parties in breach of contract are brought to perform their obligations, or are subjected to remedial measures, but losses are still incurred by the other parties, then the defaulting parties are liable to pay compensation to cover these, but with the amount of compensation not to exceed the actual or anticipatable losses occasioned by the breach (Articles 112–113). In addition, liability for breach of contract will extend to the payment of a penalty or the loss of a deposit, as where penalty clauses and deposit arrangements are included within the terms of the contracts concerned (Articles 114–115). It is further provided that liability for breach of contract may be mitigated where contracts are not fulfilled due to force majeure, that liability may be shared and apportioned as to circumstances where both parties are in breach, and that the liability of defaulting parties as involving the infringement of property rights and interests may be ascertained, and borne, as in terms of laws other than the law of contract as such (Articles 117–118, 119–120, 122).

Of the miscellaneous provisions set out in Chapter 8 of the Contract Law, there are two that merit attention as underlining the normative context set for contractual relationships within the PRC. First, it is laid down that where parties are in dispute about the meaning of particular clauses of their contracts, then this is to be inferred and determined on the basis of the words and sentences used in the contracts at issue, the related clauses of the contracts, their aims, established trade practices, and the principles of good faith (Article 125). Second,

the relevant administrative agencies of the state government are held to be responsible for supervising contracts, such as to ensure that contracts are not unlawful as in the sense of their endangering the interests of state and society and the public good, or as in the sense of their involving criminal wrong-doing (Article 127). A further miscellaneous provision is notable as in relation to settlement procedures for disputes about contracts. Thus the parties concerned may settle disputes about contracts through consultation or mediation, or, if the latter is unacceptable, through arbitration, or, as in the absence of agreed arbitration machinery, through the initiating of an action in the People's Courts: and with the parties then being bound to implement, respectively, the terms of any resulting letter of mediation, arbitration award, or legally effective judgment of the People's Courts (Article 128). Going beyond this, it is to be underlined that the provisions on the law of contract set out in Chapters 1–8 have general application to the subject-designated contracts that are discussed in the chapters with specific provisions as comprising the second part of the Contract Law. The subject-designated contracts at issue here are as follows: contracts of purchase and sale (Chapter 9); contracts for the supply and consumption of basic utilities, and specifically electricity, water, gas, and heating (Chapter 10); donation contracts (Chapter 11); contracts for loans (Chapter 12); lease contracts (Chapter 13); financial lease contracts (Chapter 14); work contracts (Chapter 15); construction project contracts (Chapter 16); contracts for carriage (Chapter 17); technology contracts (Chapter 18); deposit contracts (Chapter 19); storage contracts (Chapter 20); contracts of entrustment (Chapter 21); brokerage contracts (Chapter 22); contracts of intermediation (Chapter 23). Finally, it is to be noted that the statement on supplementary provisions affirms that the Contract Law entered into force on 1 October 1999, and with this resulting in the annulment of the prior existing statutes on economic contracts, technology contracts and Chinese-foreign economic joint venture contracts (Article 428).

## ii. The Contract Law of the PRC in Context

The 1999 Contract Law stands out as a major contribution to the development of the civil law system of the PRC. To understand the significance of this contribution, it is necessary to situate the Contract Law in its larger social, political and economic context,

and, hence, to consider it in relation to the issues of public policy in the PRC which have been central to the era of reform. Thus it is that the Contract Law is now attended to in relation to the rule of law, as in reference to what the Party-State leadership has projected as the socialist legal order, and in relation to the condition of the socialist market economic order.

#### a. The Socialist Legal Order

The commitment of the Party-State leadership to the rule of law, as through the establishing of the socialist legal order, dates from the start of the reform era and the beginnings of the ascendancy of Deng Xiaoping. This is evident from the seminal statement of the official position on reform that is to be found in the Communiqué issued following the 3rd Plenum of the 11th Central Committee of the CPC as of 22 December 1978.<sup>26</sup> Among much else resolved at this historic meeting, there was identified, as the principal goal of public policy in the PRC, the goal of socialist modernization, as falling in the contexts of industry, agriculture, national defence, and science and technology. In this connection, it was indicated that the essential precondition for the public policy objective of socialist modernization lay with economic factors and determinants such as were to do with the promoting of the expanded growth of the productive forces. This, in its turn, was taken to require that changes were to be made with the aspects of the relations of economic production and the superstructure as pertaining to the political order that were out of harmony with the expansion of the productive forces; and with its requiring also that changes were to be effected with all the methods of management, action and thinking which remained obstructive of the productive forces as to their forward expanded growth.<sup>27</sup>

The changes regarding production relations and the political superstructure, as envisaged by the Party-State leadership, were various, and they included reforms that were to have application in the areas of the system of economic management, the organization of agriculture, and, as in reference to the political order, the system of democratic centralist leadership and the socialist legal order.<sup>28</sup> As to the socialist legal order, it was resolved that

<sup>26</sup> Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China (Adopted on 22 December 1978), *Peking Review*, 52 (29 December 1978), pp. 6–16.

<sup>27</sup> *Ibid.*, pp. 9–11.

<sup>28</sup> *Ibid.*, pp. 12, 12–13, 14.

this was to be strengthened such as to give systematic form, and the force of law, to the institutions of democratic centralism, as maintained by the CPC, and to secure their stability, continuous existence and overall authority. The strengthening of the socialist legal order, in and of itself, was presented as necessitating that there had to be set down laws for the people to follow, and with the laws to be observed, and enforced, and with those parties who broke the laws being made subject to proper sanctions. In addition, it was proposed that the work of legislation was to receive higher priority within the NPC and its Standing Committee. Finally, the judicial and procuratorial organs of the state were to assert their independence: and with this to mean that they were to conform in good faith with the established laws, rules and regulations, to serve the interests of the people, to base themselves on the actual facts of the cases submitted to them for decision, to guarantee the equality of all people under the law, and to deny to all parties concerned the privilege of being above the law.<sup>29</sup>

The establishing of the socialist legal order was intended by the Party-State leadership to put an end to the crisis of state and society in the PRC that had been occasioned by the chaos of the Cultural Revolution. At the same time, the core principles of the socialist legal order, as set out in the 1978 Communiqué, are principles that can be understood as belonging to the concept of the rule of law as such. This is the concept of the rule of law where the state is based in law, and where the institutions of government are constituted through law and the powers belonging to them are organized in separation, as one from the other, while being maintained as subject to the constraints and limitations imposed through law. Here, also, it is law that is thought of as the proper instrument of public policy and as serving to define the rights and obligations of citizens, and with these having application, and being enforceable, in respect of the state and the public authorities in their relation to citizens and in respect of citizens in the sphere of their relations with one another as within

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29 Thus: 'In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematized and written into law in such a way as to ensure the stability, continuity and full authority of the democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress and its Standing Committee. Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts; guarantee the equality of all people before the People's laws and deny anyone the privilege of being above the law.' Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China, p. 14.

society. These various principles of the rule of law are all given recognition, explicit or implicit, in the 1978 Communiqué. So, for example, it was provided that democratic institutions were to be systematized, and so rendered stable, enduring and authoritative, through being underwritten in law. The demand that there were to be laws for the people to follow contained within it the implication that law, as such, should set the terms of all association within the state and the social sphere. There was an emphasis on the necessity for the executive powers, as pertaining to the enforcement of laws and the sanctioning of offenders, as well as on the necessity for the socialist legal order to be founded in institutions exercising legislative and judicial powers. As to the constraining and limitation of the institutions of government through law, this was pointed to with the call for the judicial and procuratorial authorities to maintain their independence, and with the insistence that these authorities were to ensure full equality under the law as well as to exclude the exemption and immunity of the affected parties from its requirements.

The principles of the socialist legal order identified in the 1978 Communiqué were to be confirmed on a consistent basis by the Party-State leadership as the era of Deng Xiaoping gave way to the on-going period of the realization of the reform agenda on socialist modernization, as marked by the completed presidential terms of Jiang Zemin and Hu Jintao and the transition to the current Presidency of Xi Jinping. The continuous endorsement of the socialist legal order, as in terms of its defining principles, can be found in the authoritative official statements on public policy as contained in the documents for the National Congresses of the CPC as running from the 12th National Congress of 1982 through to the 18th National Congress of 2012, and most notably so the Reports of the relevant CPC General Secretary together with the CPC Constitution as through its successively amended versions.<sup>30</sup> These various documents reflect certain refinements with

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30 The reference details for the English-language versions of the official documents of the CPC, as in the form that they are cited here, are as follows: Constitution of the Communist Party of China as adopted at the 12th National Congress of the Communist Party of China (1982) (available at <http://faculty.arts.ubc.ca/chab/p321/private/cpon.htm>); Advance Along the Road of Socialism with Chinese Characteristics: Report Delivered at the Thirteenth National Congress of the Communist Party of China on 25 October 1987 by Zhao Ziyang, in *Documents of the Thirteenth National Congress of the Communist Party of China (1987)* (Beijing: Foreign Languages Press, 1987), pp. 3–77; Constitution of the Communist Party of China (Adopted by the 14th National Party Congress on 18 October 1992), in Kenneth Lieberthal, *Governing China: From Revolution Through Reform* (New York: W.W. Norton and Company, 1995), Appendix 2, pp. 383–402; Hold High the Great Banner of Deng

the socialist legal order as to its elaboration, and, more important, the focusing on public policy concerns impacting directly on the prospects for the rule of law. Thus the cause of the socialist legal order became closely bound up with the determination of the Party-State leadership to root out corruption from government, which concern is reflected in the stipulations in the CPC Constitution that the CPC should conduct itself within the framework of the State Constitution and the laws.<sup>31</sup> It was likewise bound up with their determination to enhance efficiency and openness within the machinery of public administration, as so, for example, through bringing about the institutional separation of the CPC and the state government, as to their functions, and applying law to set the relations between the CPC, the government departments and other public organizations as among the

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Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics to the 21st Century: Report Delivered by Jiang Zemin at the 15th National Congress of the Communist Party of China on 12 September 1997 (available at <http://www.fas.org/news/china/1997/970912-prc.html>); Build a Well-Off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics: Report to the 16th National Congress of the Communist Party of China on 8 November 2002 by Jiang Zemin, and Constitution of the Communist Party of China (Amended and adopted at the 16th National Congress of the Communist Party of China on 14 November 2002), in *Documents of the 16th National Congress of the Communist Party of China* (Beijing: Foreign Languages Press, 2002), pp. 1-69, 76-114; Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects: Report to the 17th National Congress of the Communist Party of China on 15 October 2007 by Hu Jintao (available through *People's Daily Online* in 12 instalments at <http://english.people.com.cn/9001/90776/90785/6290120.html> and at <http://english.people.com.cn/90001/90776/90786/620139.html> to <http://english.people.com.cn/9001/90776/90786/620149.html>); Constitution of the Communist Party of China (Amended and adopted at the 17th National Congress of the Communist Party of China on 21 October 2007) (available through *People's Daily Online* in 12 instalments at <http://english.peopledaily.com.cn/90001/90776/90785/9290980.html> to <http://english.peopledaily.com.cn/90001/90776/90785/6290991.html>); Firmly March on the Path of Socialism with Chinese Characteristics and Strive to Complete the Building of a Moderately Prosperous Society in All Respects: Report to the 18th National Congress of the Communist Party of China on 8 November 2012 by Hu Jintao (available through *China Daily* in 14 instalments at [http://www.chinadaily.com.cn/china/2012cpc/2012-11/18/content\\*15939493.htm](http://www.chinadaily.com.cn/china/2012cpc/2012-11/18/content*15939493.htm) to [http://www.chinadaily.com.cn/china/2012cpc/2012-11/18/content\\*15939493\\*14.htm](http://www.chinadaily.com.cn/china/2012cpc/2012-11/18/content*15939493*14.htm)); Constitution of the Communist Party of China (Revised and adopted at the 18th National Congress of the Communist Party of China on 14 November 2012) (available through *China Daily* in 14 instalments at [http://www.chinadaily.com.cn/china/2012cpc/2012-11/21/content\\*15946671.htm](http://www.chinadaily.com.cn/china/2012cpc/2012-11/21/content*15946671.htm) to [http://www.chinadaily.com.cn/china/2012cpc/2012-11/21/content\\*15946671\\*14.htm](http://www.chinadaily.com.cn/china/2012cpc/2012-11/21/content*15946671*14.htm)).

31 In this connection, see for example: CPC Constitution (1982), General Programme, 19th paragraph; CPC Constitution (1992), General Programme, 16th paragraph.

key elements of the social and political structure.<sup>32</sup> There were also implications for the socialist legal order with the declared commitment of the Party-State leadership to the maintenance of the rights of citizens, which, during the era of Jiang Zemin, saw the system of socialist democracy coming to be associated with the protection of human rights.<sup>33</sup>

The recognition given to the protection of human rights, as a concern and objective of public policy, was to be made explicit in the 2007 version of the CPC Constitution, where it was stated, in the context of the CPC and its commitment to socialist democracy and the socialist legal order, that the CPC was to respect and safeguard human rights.<sup>34</sup> The formal endorsement of human rights in the CPC Constitution was very much of a piece with the terms of the theoretical contribution that Hu Jintao made to the evolving public doctrine of the PRC, and that is referred to as the scientific outlook on development. The latter was presented as being directed to the realizing of the ends of socialist modernization such that these would give effect to the establishing of a harmonious socialist society. This was an ideal conception of social order that possessed a fully normative dimension and character, and one that was associated with, and taken to be directly related to, the principles of justice and social equity. It was in terms of these normative principles that the rule of law was upheld as a fundamental component of socialist democracy, and that it was understood to promote, among much else, the human rights of the people and the equal right to political participation and development for all members of society.<sup>35</sup>

The cause of socialist democracy, and hence that of the socialist legal order, was also intimately connected with a question that emerged as central during the era of Hu Jintao, and that figures prominently in the Work Reports for both the 17th National Party Congress of 2007 and the 18th National Party Congress of 2012. This is the question of administrative reform. It is here, with administrative reform, that there is underlined that issues to do with law and the political-administrative system were brought into alignment with each other and with the first-order principles of justice and social equity such as were to be embodied in the

32 For these matters, see particularly: Report: 13th National Party Congress (1987), Section 5, especially sub-sections 1 and 7.

33 Report: 15th National Party Congress (1997), Section 6, sub-sections 1 and 2; Report: 16th National Party Congress (2002), Section 5, sub-sections 1 and 2.

34 CPC Constitution (2007), General Programme, 15th paragraph.

35 Report: 17th National Party Congress (2007), Section 6, sub-section 3; Report: 18th National Party Congress (2012), Section 5, sub-section 4.



harmonious socialist society. In this connection, the reform of the administrative system was held to involve what was referred to as the service-oriented form of government at both state and local levels, and with this relating principally to the promoting of greater administrative efficiency on the part of government institutions as to the discharging of their responsibilities with regard to the provision of public services.<sup>36</sup> The emphasis on service provision in government and administration was closely linked to the issue of social development, as where this was understood to proceed from the prosperity created through development in the economic sphere and to be directed towards the welfare of the people as in accordance with, and in furtherance of, the ends of justice and social equity. The key consideration with social development concerned the existence of certain key public services, and with the people to possess rights to the provision of these, and with this being presented as essential to the establishment of the harmonious socialist society and to its maintenance. The public service sectors that were identified as crucial for social development, and hence as the preconditions for the possibility of social harmony, were those that are recognizable as belonging to the basic framework of the modern welfare state, and thus, as such, as including education, employment support services, social security and medical health care services.<sup>37</sup>

In the years since 1978, the socialist legal order in the PRC, as conforming with the principles of the rule of law, has been developed at the direction of the Party-State leadership through the enactment of a substantial, and ever expanding, body of legislation. In regard to this, it must be emphasized that the rule of law in the PRC, in its specifically socialist form, has depended for its realization, in large part, on the establishing of a framework of public law, considered as the law applying to the state and the organization of government powers and to the state and the institutions of government as in relation to citizens. First and foremost, there is the criminal law code, and the law of criminal procedure relating to it, which received their first formulation specific to the reform era in 1979. Thus the criminal law sets out the general rules of conduct, as binding on individual citizens and other parties, and in respect of which the state has a direct interest in, and the

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36 Report: 17th National Party Congress (2007), Section 6, sub-section 5; Report: 18th National Party Congress (2012), Section 5, sub-section 5.

37 Report: 17th National Party Congress (2007), Section 8; Report: 18th National Party Congress (2012), Section 7.

institutional responsibility for, their enforcement. The general rules at issue, here, are the rules that stand as essential to a lawful and properly functioning social and political order, among which are the following: the rules relating to crimes against the state, as in regard to national security and public security, the rules relating to economic crimes, as with smuggling, fraud and tax evasion, the rules relating to crimes against the rights of the person, as with homicide, rape, abduction and violence, the rules relating to crimes against property, as with theft and extortion, and the rules relating to crimes in the contexts of the maintenance of public order, national defence, embezzlement and bribery, dereliction of duty by state and public officials, and the non-performance of duties by service personnel. As to the law on criminal procedure, the key consideration is that with criminal cases, it is the state itself, and as acting through its authorized agencies, that is charged with their investigation and with the initiating and conduct of the prosecution of offenders before the People's Courts.<sup>38</sup>

Moving from the criminal law, there is also the body of public law that is set out in the 1982 State Constitution. Thus the precepts of the rule of law are affirmed: as so with Article 5, where it is provided, among other things, that all acts in violation of the Constitution and the laws are to be investigated, that no parties are beyond the Constitution and the laws, and, as per the 1999 Amendment to the Article, that the PRC acts in conformity with the rule of law and promotes the establishing of a socialist country governed through law. It is further provided in Article 33 that all citizens of the PRC are equal under the law and that they bear the rights, and are subject to the duties, prescribed in the Constitution and the laws, and, as laid down in the 2004 Amendment to the Article, that the state is to respect and maintain human rights. Regarding the rights of citizens, the State Constitution includes a detailed specification of these. Among the rights affirmed in the State Constitution are political rights, as so with the rights bound up with the following subject-matters: freedom of speech, the press, assembly, association, procession and demonstration; freedom of religion; freedom of the person as excluding arbitrary arrest and unlawful detention, curtailment of liberty and search; personal dignity such as to exclude insult, libel, false accusation and

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38 Criminal Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Xing Fa*. (1979; and in its revised version as of 1997). Criminal Procedure Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Xingshi Susong Fa*. (1979; and in its revised version as of 1996).

false incrimination; the inviolability of residences; and the accountability of state authorities and public officials to citizens as through the bringing of complaints and the seeking of compensation for the infringement of their rights (Articles 35–39, 41). The State Constitution also secures certain rights of citizens in the economic and cultural spheres, as so in regard to work, rest and recuperation, retirement, welfare assistance, education, and scientific research, literature, the arts and cultural activities (Article 42–47).<sup>39</sup>

The State Constitution sets the institutional foundations for the rule of law in the respect that it describes and validates the principal organs of state government, as with the legislative, executive and judicial and procuratorial institutions, and specifies the powers that belong to them and hence also the legal basis and foundation for these official powers. It is with this matter that the State Constitution is most closely bound up with the branch of public law in the PRC that serves to subject the institutions of government to the law and to legal constraints and limitations as to the exercise of their powers. This is the system of administrative law and the procedure for the judicial review of administrative action that is central to it. Thus it is that the judicial review procedure provides that private citizens and other non-state parties may have recourse to the relevant People's Courts in order to challenge the acts of the administrative authorities, and to do this as in consideration of their alleged unlawfulness, infidelity to due legal procedures, taintedness through abuse of powers, or unfairness. So, at the same time, is it provided with the judicial review procedure that there are remedies available for the parties aggrieved of administrative action, which remedies are to be applied by the People's Courts as through, for example, the annulment of the administrative acts subject to judicial review, the ordering of the performance of new and remedial administrative acts, and, in some cases, the awarding of compensation. The development of the system of administrative law and the judicial review procedure has been a crucial precondition for the full realization of the socialist legal order in the PRC, and as to its conformity with the general principles of the rule of law, and with the key statute being that governing the judicial review of administrative action: the Administrative Procedure

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39 For the text of the 1982 State Constitution of the People's Republic of China (Zhonghua Renmin Gongheguo Xianfa) in the Chinese original and in English translation, and including the full Amendments made to the Constitution as dating from 1988, 1993, 1999 and 2004, see: Constitution of the People's Republic of China, 5th edition (Beijing, China: Foreign Languages Press, 2004).

Law of the PRC (1989).<sup>40</sup>

The cause of the rule of law in the PRC has been further promoted through the development of the system of civil law, and with the civil law involving its own quite particular contribution to the socialist legal order. The civil law pertains to the sphere of private law, and hence to the rights, interests and obligations of private parties. Of course, it is to be understood that the civil law stands as inter-connected with, and as complementary to, the different branches of the public law. Thus cases falling under the civil law can give rise to issues of criminal responsibility, while the investigation and prosecution of crimes may occasion the initiating of actions under civil law as against the offenders. At the same time, the judicial review of administrative action might render the administrative authorities concerned subject to civil liabilities. Here, the civil law may be said to have promoted the rule of law, as this is directed to the imposing of legal constraints and limitations on the institutions of state and government, through its providing for administrative authorities and official personnel to be subject to civil proceedings as in regard to the violation of personal and property rights and as in regard to breach of contract.

Nevertheless, the civil law remains distinct from public law and, as such, stands apart from the branches of criminal law, constitutional law and administrative law that comprise it. The public law, as to its various branches, is hierarchic-regulatory as to the aspect and character of the legal organization that it imposes and provides for. Thus the public law concerns either the state, and its internal constitutional order, or the state in its vertical form relation with the citizen-body, and as where the state itself sets and enforces the relevant laws applying to citizens and hence sets and enforces the rights, interests and obligations that the laws define. The civil law pertains to private law and, accordingly, it is law that has application to citizens and other parties in the sphere of their mutual relations and as where the rights, interests and obligations bound up with the law are set, and given effect to, as within that sphere. As for the state as in regard to the civil law, its role is, as it were, one of enablement and facilitation. For the civil law provides the legal framework within which citizens and other parties are enabled to determine for themselves their rights, interests and

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40 Administrative Procedure Law of the People's Republic of China. Zhonghua Renmin Gongheguo Xingzheng Susong Fa. For other statutes pertaining to the administrative law of the PRC, see particularly: Administrative Reconsideration Law of the People's Republic of China. Zhonghua Renmin Gongheguo Xingzheng Fuyi Fa. (1999).

obligations and where they are facilitated in the tasks of bringing legal definition and protection to these. In this explanation of it, the civil law as in the PRC, and not least the law of contract, conforms to the sense of the rule of law as in the advanced conceptualizations thereof.<sup>41</sup>

This enabling and facilitative role of the state is reflected in how the civil law allows for the recognition of rights, interests and obligations in respect of the person, property, and contract. It is reflected also in how the civil law makes possible the recognition of, and the giving effect to, the performance of the civil juridical acts through which civil rights and civil obligations are brought into being, modified and terminated. This is so, for example, with the civil juridical acts through which property is acquired or alienated. It is so also with the civil juridical acts through which contracts are entered into and established, and hence made legally enforceable. Thus the Contract Law sets out the rules and principles governing the formation of contracts, as focused on the relationship based in offer and acceptance, as well as the rules and principles pertaining to the validation of contracts as in regard to the conditions essential for the lawful execution of contracts. In addition, there are set out in the Contract Law the rules and principles applying to the conditions for the completion or fulfilment of contracts, and together with the rules and principles that have reference to the procedures to be followed for the modification or transfer of the rights and obligations, as created through contracts, and for their termination.

Above all, the Contract Law sets out the circumstances where breach of contract may occur, and hence where civil liabilities may arise. At the same time, there are elaborated the remedies for the discharging of liabilities for breach of contract, as with the performance of contractual obligations, the adoption of remedial measures or the paying of damages for breach of contract and the consequences of this. The provision of remedies for breach of contract is critical in ensuring the effectiveness of the law of contract as such. In this connection, it is to be observed that it is with the matter of remedies for breach of contract

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41 Thus the British jurist H.L.A. Hart (1907–1992) argued that the concept of law was such that an advanced legal system is to be understood to comprise primary rules of law, which serve to impose basic duties or obligations, and secondary rules of law, which serve to confer powers on public authorities or on private parties. For Hart, the category of secondary rules of law comprehends the powers belonging to parties such as facilitating them in the making of contracts and wills, and the performance of the other acts pertaining to civil law. As to the views of Hart on this matter, see: *The Concept of Law* (1961), 2nd edition (Oxford: Clarendon Press, 1994), especially Chapters 3 and 5.

that the Contract Law underlines the enabling and facilitative role of the state, as in regard to the civil law, through pointing to the necessity of the presence of the law on civil procedure. For here, with the Civil Procedure Law, there is established the judicial framework, as validated by the state, through which the subjects of the civil law are enabled, and on their own initiative, to submit their disputes regarding rights, interests and obligations to the People's Courts for adjudication. Thus the judicial procedure, as applying to civil cases, provides for the adversarial presentation of disputes as arising from civil law subject-matters where the parties stand in the relationship of plaintiff and defendant. At the same time, the civil procedure provides for the rendering of judgments by the People's Courts in civil disputes as involving the determination of civil liabilities falling on parties held to be at fault, as where appropriate, and the granting of remedies to the parties who are deemed to have been wronged. In addition, it is provided that, if required and appropriate, it is within the power of the People's Courts to impose sanctions and coercive measures as against parties refusing to comply with the judgments made in civil cases, and with this being such as to ensure the presence of a judicial machinery that carries with it actual enforcement powers sufficient to give proper material and substantive effect to the rights, interests and obligations of civil subjects.<sup>42</sup>

#### b. The Socialist Market Economic Order

The significance of the Contract Law within the PRC, and in relation to the reform-era public policy agenda, is immense, and this may be grasped through consideration of its applications in the economic sphere. For the Party-State leadership of the PRC as of 1978, the public policy objective of socialist modernization was conceived primarily in terms of

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42 It is to be noted that the rights established through the civil law move far beyond the rights of citizens that are set down in the State Constitution, as to the force and reality of their juridical standing. For the rights of citizens as set down in the State Constitution are declared to be constitutional rights, but, as such and in and of themselves, they remain unsupported by such things as remedies for the breach thereof and procedures for their enforcement. This is not so with the rights affirmed within the civil law, which, and as so not least with the rights and corresponding obligations created through contract, are rights that are given proper effect to as to their full institutional support and realization. For the specific details of the procedures for the enforcement of the judgments of the People's courts in civil cases, such as those involving breach of contract, see: Civil Procedure Law of the People's Republic of China, Chapters 20 (Articles 207–215), 21 (Articles 216–220), 22 (Articles 221–233), and 23 (Articles 234–236).

factors of economic development. Thus it was that the cause of socialist modernization was associated with the expansion of the productive forces. As it has been explained, this projected expanding of the productive forces was understood to depend on appropriate modifications being made to the political superstructure, as with the establishing of the socialist legal order, as well as to the prevailing system of production relations. As to the matter of production relations, the progress of socialist modernization since 1978 has come to involve the transition from the political command economic order, as this had been adopted in the PRC in the 1950s during the era of socialist transformation, and towards what in the reform period is referred to as the socialist market economic order.

The political command economic order in the PRC was distinguished, as an economic system, by the subjection of the means of industrial production to ownership rights and powers that were vested in the state, as on a sole and exclusive basis, and to management control rights and powers that were exercised by the relevant administrative authorities as acting for the state. Hence the political command economic order was epitomized by, and embodied in, the state-owned industrial enterprises whose operations were planned for, and directed, as through the containing political-administrative system of which they formed an integral part. The defining principles of the socialist market economic order were set out by the Party-State leadership in the 1980s, during which time the socialist market economic order was associated closely with the project of socialism with Chinese characteristics and affirmed as being uniquely appropriate to the objective circumstances of the PRC in what was identified as the primary stage of socialism. Thus the socialist market economic order was presented as an economic system where state ownership, and management control direction, of the means of industrial production were adapted to the constraints and limitations as imposed through the mechanism of the market, as so, particularly, with matters such as prices and production factors. This was to involve the dissociation of the state-owned industrial enterprises from the political-administrative structure, as through the retention of ownership rights and powers vested in the state but with management rights and powers being delegated to the enterprises themselves and to be exercised in deference to market conditions. As in line with this redistribution of ownership-management relations, the modalities of public ownership were to remain dominant, as so with the designated strategic industrial sectors. However, the modalities of public ownership were to co-exist with those

of private ownership, as in regard to the industrial sectors where the state had no strategic interests in maintaining its direct ownership, and with the socialist market economic order being thereby based in, and giving effect to, a mixed ownership rights regime.

It was in the terms as set out above that the principles of the socialist market economic order were expounded, as in reference to the socialist planned commodity economic order, at the 13th National Party Congress of 1987,<sup>43</sup> and then subsequently endorsed as a matter of official public policy in the revised version of the CPC Constitution as adopted at the 14th National Party Congress of 1992.<sup>44</sup> The socialist market economic order underwent a major development during the 1990s with the introduction of the modern corporation system. This was held to be crucial for the reform of the state industrial sectors, as where the enterprises were established as corporations with an internal organizational structure, for the purposes of their management, and with their capital investment structure being based in the principles of share ownership. As such, the modern corporation system provided for the retention by the state of ownership of the means of industrial production, where national strategic economic imperatives dictated this, while at the same time permitting certain state-owned industrial enterprises to be passed over into private ownership, in whole or in part, and yet other enterprises, without any provenance at all in the state industrial sectors, to come into being as corporate entities whose capital investment funding was supplied entirely by non-state parties.<sup>45</sup> Thus it is that the socialist market economic order has led to a significant enlargement in the scale of private ownership of the means of industrial production in the PRC, and, with it, the emergence of a substantial and ever expanding private enterprise sector. This is underlined with the acceptance of private entrepreneurs for membership of the CPC that was endorsed in the Important Thought of the Three Represents, as formulated by Jiang Zemin,<sup>46</sup> and with the formal recognition given to this novel contribution to public doctrine in the PRC, together with the affirmation of the inviolability of lawful private property rights as such, being included among the

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43 Report: 13th National Party Congress (1987), Sections 2 and 4.

44 CPC Constitution (1992), General Programme, especially 5th and 9th paragraphs.

45 Regarding the corporation system and diverse ownership rights structures, see: Report: 15th National Party Congress (1997), Section 5, sub-sections 1 and 2.

46 For the exposition of the Important Thought of the Three Represents, see: Report: 16th National Party Congress (2002), Section 2.



Amendments of the State Constitution as adopted in 2004.<sup>47</sup>

The establishing of the socialist market economic order in the PRC has been hugely dependent on the presence of a containing legal framework, and so its development has been directly bound up with that of the socialist legal order. This is true with respect to the various branches of public law. Thus the criminal law and administrative law have played a key role in the regulation of economic activity, whereas the body of economic law has served to set out the foundational legal principles of substance and procedure in contexts such as taxation, finance, natural resources, land, prices, and trade and commerce. However, it is the civil law that has been critical for the coming into being of the socialist market economic order. This is so, of course, in the respect that the civil law has provided the legal forms and legal categories applying to enterprises, corporations and securities, as these have been pivotal for the reform of the state industrial sectors. At the same time, the civil law has been centrally important for the socialist market economic order for a further, and yet more fundamental, reason. This is that the socialist market economic order has resulted in the generation of substantial private ownership of the means of industrial production: and with the civil law being uniquely appropriate to this as given that it pertains to private law and, as such, serves to identify and give definition to the rights, interests and obligations of private parties, and to their mutual relations, as these find their application in the economic sphere in the mixed form that it has assumed in the PRC. Thus it is that the civil law defines the principles of property rights and those of intellectual property, in addition to the principles underlying the rights and obligations created through contract, that have been essential preconditions for the proper, and institutionally stabilized, functioning of the socialist market economic order, as in its character as a form of economic order which, while having an irreducibly socialized component, does nevertheless give effect to market-based processes and structures.

As concerning the Contract Law, this has been critical in the effecting of the transition from the political command economic order to the socialist market economic order. For the conferring and regulating of the power of contract in respect of economic actors, as in the

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47 The Important Thought of the Three Represents is recognized as part of the official public doctrine of the PRC, and the lawful private property rights of citizens are affirmed as inviolable, in, respectively, the amended form of the Preamble to and the amended form of Article 13 of the State Constitution as in its 2004 version.

circumstances of the PRC, has worked to make possible the exercise by economic actors of a freedom in decision-making as to the subject-matters of contracts, and with this being such as to release them from formal subordination to political command economic control as vested in the political-administrative authorities. At the same time, the power of contract has involved economic actors entering into contractual relationships among themselves, and as where the rights and obligations so created reflect the disposition of material economic strengths and advantages as these are set through the balance of the forces that are at play in the free operation of the market mechanisms, as such, and without regard to the substance of political command economic determinations. In the event, the legal framework for contracts was established in the 1980s, as during the first full decade of the reform era, and with this coming about through the statutes on economic contracts, technology contracts and Chinese-foreign economic joint ventures contracts. Thus it was that the founding of the law of contract in the PRC dates from the phase in the economic reform process where the focus was on the reform of the industrial state-owned enterprises. The close inter-connectedness of the emerging law of contract and the state industrial sector reform is pointed to with the introduction and development during the 1980s of the Contract Responsibility System, as where principles of contract, and of contractual rights and obligations, were adopted in place of political command economic control modalities as the basis for the institutional relationship between the political-administrative authorities and the industrial state-owned enterprises.<sup>48</sup> Of still greater account, there is the specification of the independent decision-making rights and powers, as pertaining to the management of the industrial state-owned enterprises, that are set out in what is the relevant landmark statute on the subject: the Industrial State-Owned Enterprise Law, or Enterprise Law, of the PRC, as adopted at the 1st Session of the 7th National People's Congress on 13 April 1988 and as effective from 1 August 1988.<sup>49</sup>

There are thirteen independent decision-making rights and power assigned to the

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48 Regarding the Contract Responsibility System, see the administrative regulations from February 1988 as issued by the State Council of the PRC: Provisional Regulations concerning the Contract Responsibility System in the Industrial State-Owned Enterprises. *Quanmin Suoyouzhi Gongye Qiye Chengbao Jingying Zerenzhi Zanxing Tiaoli*.

49 Industrial State-Owned Enterprise Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Gongye Qiye Fa*.

management officials of the industrial state-owned enterprises, which are to be found laid down and elaborated in Chapter 3 (Articles 22–34) of the Enterprise Law. These either imply or comprehend directly the power of contract as pertaining to the enterprise management officials, and the rights and powers are summarized as follows as to their specific subject-matter: the determination of enterprise production and service provision planning in accordance with social demand (Article 22); the modification of state-determined production plans in accordance with market conditions, as relating to the actual availability of production materials (Article 23); the self-marketing of enterprise products (Article 24); the determination of suppliers for the purchase of the production materials for enterprises (Article 25); the pricing of goods and products, and the setting of charges for services (Article 26); the entering into negotiations and agreements with foreign businesses, and the use of retained foreign currency revenues (Article 27); the use of retained enterprise funds (Article 28); the leasing and transference of enterprise assets to third parties (Article 29); the determination of wages and bonuses for enterprise staff and workers, as in conformity with the prevailing economic conditions (Article 30); the hiring and recruitment of enterprise staff and workers (Article 31); the establishing of internal organizational structures, and the appointment of staff personnel (Article 32); the acceptance or rejection of stipulations by the political-administrative authorities as to the apportionment of the manpower, material resources and financial resources of the enterprises (Article 33); the engagement by enterprises in business transactions and arrangements with other economic entities, including investment and share-holding arrangements, and the offering of enterprise stock for the purposes of raising capital investment (Article 34).<sup>50</sup>

The independent decision-making rights and powers thus assigned to the industrial state-owned enterprises, as under the terms of the 1988 Enterprise Law, were to be confirmed through important administrative regulations dating from October 1992,<sup>51</sup> albeit

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50 There are also stipulated in Chapter 3 of the Enterprise Law certain duties falling on the management officials of the industrial state-owned enterprises, and with these including the following, as being directly relevant to matters of contract and contractual relations: the duty to fulfil the terms of state-determined production plans and to fulfil the terms of lawful contracts (Article 35); the duty to comply with state stipulations as regarding such matters as finances, employment, wages and prices (Article 37); the maintenance of quality standards with products and services (Article 38); and the maintenance of safety standards with production and working practices (Article 41).

51 The administrative regulations from October 1992, as referred to here, were issued by the State

that their specification here differs somewhat from that provided with the Enterprise Law itself.<sup>52</sup> At the same time, the independent decision-making rights and powers, as referred to, are to be found as presupposed as being vested in the management organizational structures of the enterprises that have been incorporated as in accordance with the provisions of the Corporation Law of the PRC, as adopted at the 5th Session of the Standing Committee of the 8th National People's Congress on 29 December 1993 and as effective from 1 July 1994.<sup>53</sup> And so likewise are they to be found presupposed as present within the management organizational structures of the enterprises established without incorporation: as so with the enterprises that are subject to the private ownership rights of single proprietors, as these are established in accordance with the provisions of the Individual-Exclusive Funded Enterprise Law of the PRC, as adopted at the 11th Session of the Standing Committee of the 9th National People's Congress on 30 August 1999 and as effective from 1 January 2000.<sup>54</sup>

The industrial enterprises have been the foundation of the socialist market economic order in the PRC, as in the respect of their exercise of independent decision-making rights and powers, and hence their exemption from political command economic control structures, and as in the respect of their giving effect and embodiment to ownership rights in the means of industrial production as diversified as between the state and private parties. As to the latter question, it should be observed that the sphere of incorporated industrial enterprises comprehends the limited liability and joint-stock corporations, as where ownership is based

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Council of the PRC: Regulations on Changing the Operating Mechanisms of the Industrial State-owned Enterprises. *Quanmin Suoyouzhong Gongye Qiye Zhuanhuan Jingying Jizhi Tiaoli*.

52 There are fourteen independent decision-making rights and powers assigned to the management officials of the industrial state-owned enterprises in Chapter 2 of the 1992 State Council Regulations, the overwhelming majority of which imply or involve the exercise of the power of contract. The rights and powers are as follows: production planning rights and powers (Article 8); price setting rights and powers (Article 9); market rights and powers (Article 10); purchasing rights and powers (Article 11); import and export rights and powers (Article 12); property and investment rights and powers (Article 13); rights and powers regarding the use of enterprise profits and funds (Article 14); rights and powers in the disposal of enterprise assets (Article 15); rights and powers of merger (Article 16); rights and powers in the recruiting and dismissal of enterprise workers (Article 17); rights and powers in the selection and dismissal of middle-ranking staff (Article 18); rights and powers in determining wage grades (Article 19); rights and powers as to the establishing of internal enterprise organizations (Article 20); rights and powers of refusal as to the apportioning of enterprise property (Article 21).

53 Corporation Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Gongsifa*.

54 Individual-Exclusive Funded Enterprise Law of the People's Republic of China. *Zhonghua Renmin Gongheguo Geren Duzi Qiye Fa*.

in share-holding and vested in private parties or in public parties and private parties in combination, in addition to the state-exclusive investment corporations as where ownership rights are vested in the state on a sole and exclusive basis. Concerning the unincorporated enterprises based in the ownership rights of individual proprietors, these pertain originally, and uniquely, to what now stands as the private enterprise sector. In regard to the concerns of the present paper, the key consideration is that the different industrial enterprises, however constituted, are uniformly subject to the civil law in their status as legal person entities. In consequence of this, the industrial enterprises are subject to the terms of the Contract Law, such that they are bound to follow the rules and principles applying to contracts as to their formation, validation, fulfilment, modification and transfer, and termination, as well as the rules and principles applying to the liability arising from breach of contract and the means for the discharging of this. Thus it is through their conformity with these various rules and principles on contractual relations that the industrial enterprises are enabled to exercise the independent decision-making rights and powers belonging to them: as so with such matters as products marketing, purchasing transactions, price setting, the leasing of assets, the determination of employee wages and bonuses, and the recruiting and retirement of workers. Beyond this, it is to be observed that the industrial enterprises are bound also to follow and apply the rules and principles pertaining to contracts as with those of their commercial activities involving the subject-designated contracts that are treated of in the second part of the Contract Law: the contracts of purchase and sale, for example, and also the contracts pertaining to the transactions involved in such areas of concern as the supply and consumption of utilities, loans, leases and financial leases, construction projects, carriage, technology, storage and brokerage.

The coming of the law of contract as a legal framework for the economic engagements of legal person entities, such as enterprises and corporations, and for those of individual citizens, who are natural persons, points to how the establishing of the socialist market economic order in the PRC has brought into being a market-determined condition of complex commercial interdependence among economic actors. In doing this, the law of contract points also to the extent to which the socialist market economic order has gone together with the emergence in the PRC of a real and developing civil society. For the presence of the law of contract has conferred on civil subjects, in their status as parties to

contracting, precisely the freedom to set for themselves the terms of their mutual relationships within society and economy, and without reference to the state authorities, whose exercise is to be thought of as the precondition for civil society and for its effective operation.

The sense, as above, of the inter-connectedness of contract, the market and civil society accords with the classic conceptualization of civil society as famously put forward by G.W.F. Hegel (1770–1831), as in his *Philosophy of Right* (1821).<sup>55</sup> This is the conceptualization of civil society as being distinct from the state, and as comprising a relatively autonomous sphere where, among much else, individuals and associations pursue their interests, and exercise and act to protect their respective rights, within the market as through work and labour and through entering into contractual and other forms of relationship for the purposes of their mutual and particular advantage.<sup>56</sup> At the same time, the attention given here to the law of contract and to its connections with the market and civil society, and as so in reference to the PRC, serves as a corrective to the now common endeavour of theorists concerned with explaining the character of civil society to turn not to Hegel, but to the viewpoints on civil society associated with the work of thinkers such as Alexis de Tocqueville (1805–1859)<sup>57</sup> and Antonio Gramsci (1891–1937),<sup>58</sup> and, in doing so, to insist on the necessity for the maintenance of a clear distinction, in conceptual and practical terms, as between civil society and the market.<sup>59</sup> As to the matter of the law of

55 G.W.F. Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet, ed. Allen W. Wood (Cambridge: Cambridge University Press, 1991).

56 For Hegel on these aspects of civil society, see: *Philosophy of Right*, Part 3: Ethical Life, Section 2: Civil Society, sub-section A.

57 In this connection, there is the discussion by Tocqueville of the role played by the political and civil forms of association as standing between the state and private citizens: *Democracy in America*, trans. Arthur Goldhammer (New York: Library of America, 2004), especially Volume 1, Part 2, Chapters 2–4, and Volume 2, Part 2, Chapters 4–7.

58 With Gramsci, civil society was distinguished from the state, and explained as the sphere of private associations as based in consent, and established for political, economic, religious, educational and cultural purposes, and as the sphere of culture and cultural conflicts. In this connection, see particularly: *Prison Notebooks*, in *The Antonio Gramsci Reader: Selected Writings 1916–1935*, trans. Quintin Hoare and Geoffrey Nowell-Smith, ed. David Forgacs (New York: New York University Press, 2000), Part 2, Chapters 6–7. 10.

59 For a collection of essays where civil society is identified primarily in terms of group-based social activity taking place outside (and hence distinct from) the state, the market and the family, see: *The State of Civil Society in Japan*, ed. Frank J. Schwartz and Susan J. Pharr (Cambridge: Cambridge University Press, 2003).

contract in the PRC as in relation to civil society, and as it works to collapse the distinction between civil society and the market, it is pertinent to recall, in passing, the view of contract argued for by the American jurist Lon L. Fuller as in his celebrated contribution to contract jurisprudence.<sup>60</sup> For it was the argument of Fuller that there obtains an essential correspondence between the ends of contract law and the ends of the prevailing credit-based economic system, and which he presented as being associated with the regime of free commercial markets.<sup>61</sup>

The law of contract in the PRC is part of the system of civil law, and hence it pertains to the rights, interests and obligations that belong to the sphere of private law. It is in its status as law that relates to the private rights, interests and obligations of civil subjects that the law of contract contributes to the legal framework for the socialist market economic order, and plays its role in the emergence of civil society and its development. There is here presented for consideration a fundamental question to do with the law of contract in the PRC, both in respect of itself and in respect of its bearing on civil society. This is the question as to whether the contract law is to be thought of as moving beyond the protection of private rights, interests and obligations and towards the promotion of public goods and values, and as to whether the provisions of the contract law as concerning private rights, interests and obligations are qualified by reference to the interests that are bound up with the collective welfare of society as such. In the event, it is clear that the law of contract in the PRC does so move from private to public and collectively defined concerns, as given that the form of economic order to which the contract law contributes is a socialist market economic order, and hence a form of economic order where the principles of freedom of contract, as specific to the market disciplines, are understood to be subject to the constraints and limitations such as are bound up with socialism and the ends particular to it. Thus it is that in line with this, it is laid down explicitly in the Contract Law, as among the general principles governing the law of contract, that the purpose of the law of contract is to maintain the socio-economic order and to promote the ends of socialist modernization (Article 1). There is also reference made to the parties to contracts being bound by such

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60 Regarding the arguments of Fuller to do with contract jurisprudence, see especially: Lon L. Fuller (with William R. Perdue, Jr.), 'The Reliance Interest in Contract Damages', *Yale Law Journal*, Volume 46 (1936-1937), Part 1: pp. 52-96, Part 2: pp. 373-420.

61 Fuller, 'The Reliance Interest in Contract Damages', Part 1: pp. 59-63.

normative standards as equity and good faith (Articles 5–6), and to their being required, in making and discharging contracts, to conform with the laws and administrative regulations, and to respect social ethics, as well as to refrain from subverting the socio-economic order and going against public interests and the interests of society (Article 7). Moving beyond the statement of general principles, it is also provided in the Contract Law, as in connection with the grounds for denying validity to contracts, that contracts are to be considered invalid in circumstances where they violate the interests of the state, do harm to social and public interests, or disregard the laws and administrative regulations (Article 52).

There is nothing problematic about the law of contract being thought of as serving to promote the ends of socialist modernization, or about contractual relations, as pertaining to the socialist market economic order, as being thought of as subject to the sort of prohibitive normative constraints and limitations such as are referred to above. For it is evident that the parties to contracts are subject to the laws and to the administrative regulations: as so, for example, in the sense that contracts entered into by civil subjects are governed by the ordinary provisions of the criminal law and by regulatory regimes established by the administrative authorities. It is likewise evident that contracts may legitimately be required to be made consistent with state interests, and with social and public interests, and as where these various collective interests are themselves defined through, and in terms of, the containing framework of laws and administrative regulations. Even so, it is proper to ask, by way of a conclusion, whether the law of contract can be thought of as playing a positive and constructive role in advancing the collective interests bound up with socialist modernization, as distinct from the contract law regime meeting, or otherwise fulfilling, these interests in the more narrowly negative sense as through the bare fact of its conformity with the prohibitive normative restrictions that are held to apply to it.

At the present time, the forward trajectory of public policy in the PRC does certainly point to situations where the law of contract, and the principles specific to it, may come to have an important part to play in the furtherance of collective interests. As one case of this, there is the proposal for a system of public services, as a component of the project, as envisaged by Hu Jintao, for establishing a harmonious socialist society giving realization to the principles of social equity and justice, and with the public services that are involved, here, relating to education, employment, income distribution, social security and pensions,



and medical health care. If the form of legal framework most appropriate to the public service system would appear to be the public law framework, as based in administrative law, there does nevertheless remain the real prospect of the law of contract discharging a significant supportive and contributory function in the development of the public service system from the standpoint of both its regulation and the securing of the rights of citizens. Thus it is that the way forward with public service provision may well be taken to lie with the administrative authorities contracting out the responsibility for the provision of the relevant designated public services to public agencies or private actors: and as where the latter agencies and parties will be rendered accountable to the administrative authorities through a form of quasi-contractual liability, and with this accountability to be made enforceable at the instigation of the parties who are the beneficiaries of or claimants for the public services in question. As a further case in point, there is the issue of the law of contract as in regard to the focus, as within current public policy, on the protection of the environment. In the course of the Hu Jintao era, the scientific outlook on development was taken to have, as part of its object of reference, the realizing of the ideal of a comprehensive, balanced and sustainable development, and with the cause of ecological progress being given much prominence among the principles of the harmonious socialist society.<sup>62</sup> As to this, it is to be observed that while it remains the case that the criminal law and the regulatory structures bound up with the administrative law provide the most effective legal machinery for ensuring and promoting the protection of the environment, the law of contract may also play its part here as where there is provision made in relevant legislation for the inclusion of clauses pertaining to environmental protection concerns within the standard forms of commercial contract and within the terms of other contracts. This, to be sure, would be entirely in line with the future direction of public policy in the PRC regarding the environment, as this is now unfolding during the early years of the leadership of Xi Jinping.<sup>63</sup>

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62 In this connection, see particularly: Report: 18th National Party Congress (2012), Section 8; CPC Constitution (2012), General Programme, 18th paragraph.

63 As an indication of this, see the following statements made by Xi Jinping in 2013 on the issue of ecological progress: 'A Better Environment for a Beautiful China', 'Usher in a New Era of Ecological Progress' and 'Leave to Our Future Generations Blue Skies, Green Fields and Clean Water', in Xi Jinping, *The Governance of China* (Beijing, China: Foreign Languages Press, 2014), pp. 229, 230-2, 233-4.